Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1979

No. 79-1837

DONALD E. ROBINSON, JR.,

*Petitioner,*

*v.*

GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PAUL J. GINNELLY
*Attorney for Respondent*
(Gerard M. LaRusso, *of Counsel)*
Office of Grievance Committee
19 West Main Street, Room 1002
Rochester, New York 14614
Telephone: (716) 546-8340

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IN THE

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v.

Grievance Committee of the Seventh Judicial District,

Respondent

## PRELIMINARY STATEMENT

This brief is submitted in opposition to the petition for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, entered on September 28, 1979 which struck petitioner's name from the roll of attorneys of the State of New York.

## STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because of certain in-

accuracies and misleading statements in the petition for a Writ of Certiorari.

The disciplinary proceeding against the petitioner was instituted pursuant to the Rules set forth by the Supreme Court of the State of New York, Fourth Department, Appellate Division Rules, specifically Rule 22 N.Y.C.R.R. §1022.19 of the Rules Relating to Attorneys, as well as the authority given to the Appellate Division under §90 of the New York State Judiciary Law.

After service of the charges upon the petitioner detailing allegations of professional misconduct and based upon the petitioner's responsive pleadings, the Appellate Division referred the issues raised by the pleadings to Referee, the Honorable Daniel A. DePasquale, for Findings of Fact. A total of six hearings were held between July and November of

1978 wherein the Referee received approximately thirty exhibits introduced by the respondent. At each hearing the petitioner appeared with counsel and cross examined the adverse witnesses and, thereafter, called witnesses in his defense.

Thereafter, on May 4, 1979 the Referee submitted a detailed report to the Appellate Division pursuant to their direction. On May 15, 1979 the Supreme Court, Appellate Division, Fourth Department heard the respondent's application to confirm the Referee's Report and in addition, heard the petitioner's application to dismiss the charges.

The allegations of professional misconduct were detailed in four separate charges and, in sum and substance, they focus upon two different meetings which this petitioner had with undercover law enforcement officials wherein

the petitioner received sums of money in exchange for information concerning cases in the U. S. Attorney's office. The two incidents taking place on January 29 and February 13 of 1976 were videotaped and voice recorded and viewed by the Referee in the disciplinary proceedings below. The petitioner during the time in question was an Assistant United States Attorney.

Petitioner's presentation of the facts to this Court are incorrect and distorted and do not include the various acts which illustrate that his conduct during the time in question was calculated and intentional.

The Referee has submitted a thorough, detailed and balanced report of all the facts presented to him as illustrated by his Findings which are included in petitioner's Appendix B. Accordingly, respondent in the interest

of brevity adopts them.

However, emphasis should be placed upon the Referee's Findings wherein petitioner's same arguments raised before this Court were found to be unacceptable and that his conduct could not be excused. Although the Referee indicated the existence of some police pressure, the Referee stated that it did not rise to the level as petitioner has portrayed. (Referee's Report, Petitioner's App. B at 28 and 29).

Moreover, the Referee in his factual Findings concluded that no entrapment existed and was unsupported by the evidence before him. (Referee's Report, Petitioner's App. B at 27- 29 and 32).

Based upon the Referee's Findings, the Appellate Division, Fourth Department found serious violations of the Lawyer's Code of Professional

Responsibility including Disciplinary Rule violations of misconduct (Disciplinary Rule 1-102), the failure of this petitioner to preserve the confidences and secrets of a client (Disciplinary Rule 4-101), violations of his duties as a public official (Disciplinary Rule 8-101), and that he failed to avoid the appearance of impropriety (Disciplinary Rule 9-101). It should be noted that the Supreme Court, Appellate Division, Fourth Department found fewer violations of the Disciplinary Rules than the Referee reported in his Findings.

Thereafter, from the Appellate Division's Order of Disbarment, dated September 28, 1979, the petitioner sought leave to appeal to the Court of Appeals of the State of New York, which was denied on November 27, 1979. (Petitioner's App. C at 1).

At that juncture, the petitioner

filed a Notice of Appeal As of Right dated December 21, 1979 pursuant to New York Judiciary Law §90(8) and 5601(b) of the New York Civil Practice Law and Rules on the basis of constitutional grounds. Respondent's motion to vacate petitioner's Notice of Appeal was granted on February 20, 1980 on the grounds that no substantial constitutional question was directly involved. (Petitioner's App. C at 2).

## Reasons for Denying the Writ

### POINT ONE

### THE EXISTENCE OF ENTRAPMENT AND EXTREME POLICE MISCONDUCT IS CONTRARY TO THE REFEREE'S FINDINGS AND UNSUPPORTED BY THE EVIDENCE BELOW.

The petitioner urges this Court to grant a Writ of Certiorari to review his Order of Disbarment based on the fact that a defense of entrapment and gross police misconduct was established in the disciplinary hearings below. Petitioner claims, as a matter of law, that this constitutes a violation of his constitutional rights and should have been a defense in his disciplinary proceedings.

However, petitioner's argument regarding entrapment and extreme police misconduct were not found to exist by the Referee, the Honorable Daniel A. DePasquale, after hearing the evidence. The Referee in his report to the Appellate

Division made specific findings with regard to the non existence of facts which would constitute entrapment (Petitioner's App. B at 28 and 32).

Nor was petitioner's argument sustained by the Supreme Court, Appellate Division, Fourth Department, in their review of the same position advanced by the petitioner in his Motion to Dismiss the charges of professional misconduct.

The Appellate Division rejected the petitioner's contention and found that he was not entrapped (Petitioner's App. A at 3). It should be noted that the petitioner did not move at this time before the Appellate Division in his Motion to Dismiss the Petition, dated June 20, 1979, to disaffirm the Referee's factual findings but instead moved to dismiss the charges based on the Referee's Findings and in the interest of justice ([Petitioner's] Memorandum In Support of

Motion to Dismiss, at 1).

The Referee and the Appellate Division were not faced with the issue of whether or not a defense of entrapment would bar a disciplinary proceeding since the evidence produced at the disciplinary hearings did not sustain such a finding.

It should be noted that the Referee characterized the police pressure upon the petitioner as "solicitation" in his factual determination that entrapment did not exist. The Referee did indicate that the tactics employed by the undercover agents should be addressed as a factor in mitigation for the Court's consideration (Petitioner's App. B at 28).

It should be emphasized that the petitioner again raised the same issues of police pressure and entrapment in his application seeking permission to appeal to the New York Court of Appeals. The Court of Appeals denied petitioner's

application on November 27, 1979 (Petitioner's App. C at 1).

Thereafter, the petitioner sought an Appeal as of Right under the New York Judiciary Law §90(8) on the basis that his constitutional rights were violated. The Court of Appeals in reviewing the same arguments again rejected petitioner's position and dismissed the Appeal on the basis that no substantial constitutional question was directly involved in the case (Petitioner's App. C at 2).

The petitioner seeks to have this case reviewed on the grounds that the law enforcement officials were guilty of extreme misconduct. Law enforcement officials are not precluded from utilizing decoys and undercover agents and a solicitation, request or approach by law enforcement officials, in this case posing as organized crime figures,

to engage in criminal activity standing alone is not enducement to constitute an entrapment. (United States vs Russell 411 U.S. 425 (1973), United States vs Demma 523 F. 2d 981 (1975), United States vs Perry 478 F. 2d 1276) cert. denied, 414 U.S. 1005 (1973).

Since the issue of entrapment as a defense to an attorney's disciplinary proceeding has not been previously raised in New York, even though the defense was not established below, two recent California cases have examined this issue and found that even though a defense of entrapment and even a claim of duress were found to exist they did not constitute a bar to a disciplinary proceeding. (Kee Wong vs State Bar of California 15 Cal 3d 557, 125 Cal. Rptr. 482 (1975) and In Re Arnoff 150 Cal Rptr. 479 (1978).

Therefore, for the sake of argument, even in cases where a defense

is demonstrated, courts reviewing disciplinary proceedings in other state jurisdictions have held that the issue of entrapment in a criminal proceeding is not appropriate as a defense. In the present fact situation before this Court, it was not necessary for the Referee or the Supreme Court, Appellate Division or the New York Court of Appeals to address themselves to the question of whether entrapment is an affirmative defense because it was unsupported by the evidence. Therefore, this Court is not confronted with the issue to review as petitioner claims.

POINT TWO

THE ACQUITTAL OF CRIMINAL CHARGES DOES NOT BAR SUBSEQUENT DISCIPLINARY ACTION AGAINST AN ATTORNEY FOR THE SAME CONDUCT.

The petitioner has repeatedly contended that his acquittal in federal court (United States of America vs Donald E. Robinson, Jr., case #76-355M (CR) is a bar to any subsequent disciplinary hearing reviewing his ethical conduct arising out of the same circumstances as his criminal proceeding.

This premise is not consistent with the decisions established by the New York Courts. The New York Court of Appeals have repeatedly held that disciplinary proceedings against an attorney for professional misconduct are not criminal in nature but civil in character. Matter of Anonymous Attorney, 40 N.Y. 2d 506, (1977), Matter of Zuckerman, 20 N.Y. 2d 430, (1967),

cert. den. 390 U.S. 925 (1968), Matter of Unger, 27 A.D. 2d 925, cert. den. 389 U.S. 1007 (1967). Likewise the prior acquittal of a criminal offense is no bar to a subsequent disciplinary proceeding since it is well established that disciplinary proceedings are to be determined based upon a fair preponderance of the evidence and reasonable inferences drawn therefrom (Feola vs New York State Bar Association, 37 A.D. 2d 789). Using this reasoning, the standard of proof that your respondent is faced with in proving professional misconduct is lower and less than the prosecutor's standard in a criminal case that of beyond a reasonable doubt. The New York Court of Appeals in Anonymous, supra, 40 N.Y. 2d 506, 509 stated:

> "Disciplinary proceedings against an attorney for misconduct have consistently been held not to be criminal proceedings but rather serve

> to protect the Court and society from the practice of law by persons who fail to maintain the necessary standards of integrity and probity."

The Court of Appeals further reaffirmed the words of Judge Cordozo that:

> "Membership in the bar is a privelege burdened with conditions....to strike the unworthy lawyer from the roll is not to add to the pains and penalties of the crime."

(Matter of Rouss, 221 N.Y. 81, 84-5).

Furthermore, since the quantum of proof between the criminal prosecution and the disciplinary proceeding is different, the same reasoning is applied to petitioner's argument that his prior acquittal is res judicata to the subsequent disciplinary proceeding. Likewise, his claim of a defense of double jeopardy is misplaced and unavailable to an attorney in a disciplinary proceeding simply because the attorney was acquitted

in a criminal proceeding based upon the same facts.

This distinction as to whether a disciplinary proceeding is either civil or criminal has been fully explored by state and federal courts. It has been distinguished basically upon the ultimate purpose and nature of a disciplinary proceeding. The various courts confronting this issue have indicated that disciplinary proceedings are special proceedings, sui generis, in character and are the result of the inherent power of the state courts over their officers. In Re Daley, 549 F. 2d 469 (1977), In Re Bogart, 386 F. Supp 126 (1974).

In Re Daley, supra, the Court stated:

> "The essence of state bar disciplinary proceedings however, is not a resolution regarding the alleged criminality of a person's acts, but rather a determination of the moral

> fitness of an attorney to continue in the practice of law. Although conduct which could form the basis for a criminal prosecution might also underlie the institution of disciplinary proceedings, the focus is upon gauging an individual's character and fitness, and not upon adjudging the criminality of his prior acts of inflicting punishment for them."

Thus, petitioner's claim in this case that he has a defense of res judicata and double jeopardy because of his prior criminal acquital is without substance. Moreover, his assertion that his acquittal in Federal Court was based upon a defense of entrapment is incorrect. The jury in petitioner's criminal case and in criminal cases in general, make no specific findings and, therefore, we have no way of knowing the rationale of their decision or if such a defense, so raised by petitioner was in fact, proven.

## POINT THREE

### NEW YORK JUDICIARY LAW §90(8) DOES NOT VIOLATE PETITIONER"S DUE PROCESS AND EQUAL PROTECTION GUARANTEES BY LIMITING REVIEW OF HIS DISBARMENT ORDER TO CONSTITUTIONAL QUESTIONS

The New York Court of Appeals has traditionally dismissed Appeals as of Right on alleged constitutional grounds in matters involving discipline of attorneys where the lower court decision and the Findings of Facts by the Referee did not directly or necessarily involve a constitutional question.

The Court of Appeals has continually held that the requirement to invoke its jurisdiction to review will lie only where there is not only a constitutional question directly involved but that its involvement was controlling in a lower court decision. (In Matter of Finn, 286 N.Y. 464, Matter of Healy, 8 N.Y. 2d 1137, Javits vs Stevens, 28 N.Y. 2d 924, In the Matter of Philip Peltz, 43 N.Y. 2d 844).

Likewise, in Javits vs Stevens, supra, 382 F. Fupp 131, the United States District Court held that the provisions of the New York Judiciary Law concerning the removal from practice of attorneys and the procedures relating to review of their appeals did not violate due process or equal protection.

Although a three-judge Federal Court in Mildner v Gulotta, 405 F. Supp. 182, reviewed an attorney's claim challenging the constitutionality of §90 of the New York Judiciary Law, the Court denied the application on the basis that "the prevailing standards of federalism and comity, abstention is ....appropriate." The concurring opinions of two of the Justices explored in detail in what must be considered dictum, the constitutionality of the New York Law and found it not to violate on grounds of equal protection or due process claims.

Moreover, In the Matter of Gerzof, 35 N.Y. 2d 855 the Court of Appeals vacated the petitioner's Notice of Appeal (and denied leave to appeal), implicitly rejecting petitioner's attempt to frame a "constitutional" issue for the sole purpose of providing a colorable basis for a non existent Appeal of Right.

Gerzof's subsequent attempt to challenge the New York Judiciary Law, §90 as being unconstitutional upon grounds, among others, that it denied attorneys an Appeal as of Right, was rejected by a federal three judge constitutional court (405 F Supp 182), the Supreme Court of the United States (425 U.S. 901) as well as the New York Court of Appeals (40 N.Y. 2d 960). The latter New York Court rejected Gerzof's appeal on the grounds "that no substantial constitutional question was directly involved:..."

## CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain his burden of establishing under Rule 19 that there are special and important reasons why a writ should be granted. The proceedings below did not involve any important question of federal law which has not been, but should be settled by this Court. In addition, the Supreme Court, Appellate Division of New York has not decided a federal question in this case which in any way conflicts with applicable decisions with this Court or any other state court of last resort on the same matter. Therefore, the petition for Writ of Certiorari should be denied.

June 10, 1980

Respectfully submitted,

Gerard M. LaRusso
Of Counsel